RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jun 23, 2011, 4:51 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

No. 85810-1

IN THE WASHINGTON SUPREME COURT
ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

On Appeal from the United States District Court
for the Western District of Washington at Seattle

No. 10-35228

CHAD MINNICK, *et. al.*,
Appellant,

vs.

CLEARWIRE US, LLC *et al.*,

Respondent.

REPLY BRIEF OF APPELLANT

JONATHAN K. TYCKO
MELANIE J. WILLIAMSON
TYCKO & ZAVAREEI LLP
2000 L Street, N.W., Suite 808
Washington, D.C. 20036
(202) 973-0900
Attorneys For Appellants

FELIX G. LUNA
MATTHEW G. KNOPP
PETERSON YOUNG PUTRA, P.S.
1501 Fourth Avenue, Suite 2800
Seattle, WA 98101
206-624-6800
Attorneys For Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

Rules

Treatises

I. INTRODUCTION

Clearwire promised "always on," "superb quality" Internet service at "broadband speeds." *See* Plaintiffs' First Amended Complaint (the "Complaint"), Excerpts of Record ("ER") at 25-26. Plaintiffs signed up for that service, and in so doing assented to Clearwire's "click through" Service Agreements. Each of the Plaintiffs then either terminated, or attempted to terminate, his or her contract with Clearwire because Clearwire provided service that was actually spotty, slow, or, in some cases, non-existent. Some Plaintiffs who terminated were then hit with an early termination fee ("ETF"). Some Plaintiffs who terminated were not hit with an ETF because they cancelled their credit cards before Clearwire could push the ETF through, but were then subjected to collection proceedings by Clearwire, attempting to recover the ETFs. And some Plaintiffs, faced with the threat of an ETF when they called to cancel, continued to make monthly payments until their contracts expired.

Clearwire attempts to re-characterize this course of events. It claims—without any support in the record—that all of the Plaintiffs "chose" long-term contracts over a more expensive month-to-month option. And it contends, contrary to the allegations of the Complaint, that none of the Plaintiffs had an ETF "imposed" on them, but rather that they all made a "choice" to either pay the ETF or continue in the contract.[1] Thus, Clearwire's entire position is contrary to the rule that, on appeal from a grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must accept the allegations of the complaint as true, and not rely upon a defendant's factual assertions outside the complaint.

Clearwire is also wrong on the law. Plaintiffs propose a clear, easily-applied rule: if a long-term subscription contract includes an early termination fee, then that fee should be treated as "liquidated damages" if: (a) the fee is imposed upon breach or termination of the contractual relationship; and (b) if the customer cannot obtain return performance from the vendor through payment of the fee. That rule is consistent with prior Washington case law, and with the recent decision in *In re Cellphone*

---

[1] Clearwire also responded to Plaintiffs' recitation of the procedural history, wherein they described their bringing a motion for indicative ruling and stating—in error—that the Ninth Circuit certified a question to this Court on April 1, 2011 when, in actuality, April 1st was the date that this Court *accepted* review, by contending that the district court ruled that it "would not grant plaintiffs leave to amend even if it had jurisdiction to do so." Def.'s Br. at 11. Clearwire is overstating what the district court ruled. Contrary to Clearwire's argument, the district court did not get that far. It construed Plaintiffs' motion as a motion to reopen on the basis of "newly discovered evidence" under Federal Civil Rule 60(b)(2), and because Plaintiffs filed their motion more than a year after judgment was entered in the case, the district court considered the motion time-barred. *See* Order Denying Indicative Ruling at 3 (attached as Exh. A hereto). The district court also declined to alternatively construe the motion as an "independent action to set aside a prior judgment" for reasons that had nothing to do with the district court's prior disposition of the case, and which will have no prejudicial effect on Plaintiffs' ability to amend their Complaint and add the new allegations on remand. *See id.* Of course, if the Court *had* proceeded and considered the motion, it would have been compelled to accept the new allegations as true, and to ignore every one of Clearwire's arguments that the new allegations had no "basis in fact," as it claims at page 11, note 1 of its brief. *See In re Kelly*, 2007 WL 3070595, at * 4 (W.D. Wash. 2007) (citing *Defenders of Wildlife v. Bernal*, 204 F.3d 930, 929 (9th Cir. 2000)).

Fee Termination Cases, 193 Cal. App. 4th 298, 122 Cal. Rptr. 3d 726 (2011), *review denied*, No. S192165 (Cal. April 11, 2011). *See* Opening Brief of Appellant ("Opening Br.") at 23-34. That rule would *not* prohibit vendors from including ETFs in their form contracts; however, it would limit ETFs to amounts that satisfy the well-established standards that have traditionally been applied to liquidated damages. *See* Opening Br. at 19-20. That rule would act as a reasonable check on exorbitant ETFs, a check that is needed because ETFs are typically an element of contracts of adhesion, and because vendors have strong incentives to set those ETFs as high as possible to discourage customer "churn."

In contrast, Clearwire never articulates a clear dividing line between liquidated damages and alternative performance. Instead, Clearwire argues that any termination fee that offers a "real option" and a "reasonable relationship" to continuing to make monthly payments is an "alternative performance," and thus exempt from the standards that apply to liquidated damages. Brief Of Defendant/Appellee Clearwire US, LLC ("Def. Br.") at 18. Clearwire argues that both of those standards—"real option" and "reasonable relationship"—are satisfied here because, depending on when a customer cancelled, the amount of the ETF might be less than the sum of the remaining monthly payments. *See* Def. Br. at 18-21. But, in an attempt to reconcile its position with *In re Cellphone Fee*

Termination Cases, Clearwire acknowledges an exception to those standards: even an ETF that is "reasonable" compared to continued performance would be considered "liquidated damages" if the customer does not "choose" the ETF, but instead has the ETF "imposed" by a vendor "for breach." *See* Def. Br. at 23, 43-44.

Clearwire's proposed "real option"/"reasonable relationship" standard ignores the oft repeated rule that a true "alternative performance" is one given in exchange for a return performance by the other party. Clearwire's attempts to distinguish *In re Cellphone Fee Termination Cases* fails; no meaningful difference exists between the ETFs at issue in that case, and the ETFs at issue here. Moreover, the standard Clearwire advocates for would, if adopted by this Court, raise numerous factual issues, and thus preclude dismissal at this stage of the proceedings.

II. ARGUMENT

A. Clearwire's Contention That the Plaintiffs Were Offered a "Choice" Between a Term Contract and a Month-to-Month Contract Is Irrelevant to the Issues Before This Court and Unsupported in the Record.

Clearwire begins its brief with a factual assertion: "[w]hen plaintiffs signed up for telephone or Internet service from Clearwire US, LLC, they had a choice between (1) a month-to-month contract or (2) a contract with a commitment for two years of Clearwire service, which required them to make monthly payments totaling at least $700." Def. Br. at 1. *See also id.* at 6, 14, 19-20 (repeating the assertion).

Even if Plaintiffs had been given a "choice" between a month-to-month contract and a long-term contract, that would have no relevance to whether the ETFs in the long-term contract are liquidated damages. Once Plaintiffs and Clearwire entered into the long-term Service Agreements that included ETFs, Plaintiffs did not have a "choice" to switch to a month-to-month contract. Thus, whether the ETFs are liquidated damages or "alternative performance" must be determined within the context of the actual contracts into which the parties entered. The fact that Plaintiffs theoretically could have entered into other, different contracts with Clearwire—or, for that matter, with Clearwire's competitors—is irrelevant to the enforceability of the contracts into which they actually entered.

In addition to being irrelevant, Clearwire's assertion is a distortion of the record. The Complaint does not allege that any of the Plaintiffs were offered a month-to-month contract, and nothing else in the record supports Clearwire's assertion. Attached as an exhibit to the Complaint is a copy of Clearwire's Service Agreement, with an effective date of January 27, 2009. ER 60. Paragraph 2 of that version:

> (b) Month to Month Subscriber – You will be able to use the Service for any thirty [sic] consecutive thirty day period which has been paid in advance.

ER 62. But the mere fact that a "month-to-month" subscription is mentioned in a "click through" agreement does not prove that anyone—let alone the Plaintiffs in this action—was ever offered a "month-to-month" subscription by Clearwire.

Moreover, the evidence that Clearwire itself put into the record suggests, if anything, that at least eleven out of the twelve Plaintiffs were *not* offered a month-to-month subscription. Those Plaintiffs signed up with Clearwire during periods of time when Clearwire was using earlier, different versions of the Service Agreement *which made no mention of a "month-to-month" subscription.* In support of its motion to dismiss, Clearwire offered a declaration from Kim Camacho, Clearwire's Director of Customer Retention. *See* Supplemental Excerpts of the Record ("SER") at 117. According to Ms. Camacho, only one of the Plaintiffs—Eve Girod—enrolled in a click-through Service Agreement during the time that the Service Agreement containing the "month-to-month" language was in effect.[2] *See* SER 120. In other words, the factual

[2] Clearwire takes Plaintiffs to task for asserting that the Service Agreement is presented to Clearwire's subscribers only in "click through" form on Clearwire's website, claiming that this is "unsupported by the record and false." Def. Br. at 7 n.2. But Ms. Camacho's declaration—put into the record by Clearwire itself to authenticate and explain the Service Agreements—states that "it has been Clearwire's regular business practice to require all customers affirmatively to assent to Clearwire's then current Terms of Service by clicking an acknowledgement on its Web site before customers' Clearwire services could be enabled." SER 119. That declaration makes no mention whatsoever of any other means by which Clearwire obtains customer assent to the Service Agreements.

assertion made in the first sentence of Clearwire's brief is pulled from thin air, without any support in the record.[3]

B. Clearwire's Attempts to Distinguish *In re Cellphone Fee Termination Cases*, and to Rely Upon *Hutchison* and *Schneider*, Are Misplaced.

In *In re Cellphone Fee Termination Cases*, 193 Cal. App. 4th 298, 122 Cal. Rptr. 3d 726 (2011), the court considered ETFs charged by Sprint pursuant to subscription contracts for cellular telephone service. 193 Cal. App. 4th at 305, 122 Cal. Rptr. 3d at 731. Addressing precisely the question presented here, the court held that the ETFs were not "alternative performance," and could be challenged under standards applicable to liquidated damages. 193 Cal. App. 4th at 329-30, 122 Cal. Rptr. 3d at 752-53. The court rejected Sprint's argument that its customers were given a "choice" between paying the ETFs or continuing to make their monthly payments, precisely Clearwire's argument here. *Id.*

Clearwire does not argue that *In re Cellphone Fee Termination Cases* was wrong; rather, it tries to distinguish it by claiming that in that case Sprint "styled" the ETF as a liquidated damages clause in "several versions" of its agreement and that Sprint "imposed" its ETFs on

[3] Clearwire made this same assertion (albeit somewhat less vigorously) in the brief it filed with the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit, in the "Background" section of its Certification Order, accepted the assertion, leading Clearwire to now proclaim that "[a]s the Ninth Circuit observed in its certification order, all twelve plaintiffs could have chosen a month-to-month contract with no ETF." Def. Br. at 6. But this Court should not make the same mistake. Nothing in the record supports that assertion, and the Camacho declaration suggests, if anything, that it is not true.

customers, while Clearwire merely charges ETFs to customers who "choose" them. Def. Br. at 24-25. But no reason exists why Sprint's ETFs and Clearwire's ETFs should be treated differently.

To begin with, as this Court noted in *Chandler v. Doran*, the parties' intent is a key factor in determining whether a contract provision should be characterized an alternative performance provision or a liquidated damages clause. *Chandler v. Doran*, 44 Wn.2d 396, 400, 267 P.2d 907, 910 (1954). Here, because the Service Agreement is a contract of adhesion for which no bargaining occurred, and because the case is before the Court without the benefit of any discovery, there is no way for Plaintiffs or the Court to know how Clearwire "styled" the ETF internally before finalizing the Service Agreement. Under Washington law such information is typically relevant in determining the meaning to assign to contract provisions. *See, e.g., Neuson v. Macy's Dept. Stores Inc.*, 160 Wn. App. 786, 249 P.3d 1054, 1058 (2011) (citing *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 895, 28 P.3d 823 (2001)) (explaining that the "'context rule' is the framework for interpreting written contract language which involves determining the intent of the contracting parties by viewing the contract as a whole, including the subject matter and objective of the contract, all circumstances surrounding its formation, the subsequent acts and conduct of the parties, statements made by the parties in preliminary negotiations, and usage of trade and course of dealings.")).

Moreover, however the ETF is "styled," *Chandler* also cautions:

> The fact that a promise is expressed in the alternative, however, may easily be given too much weight. As the question of liquidated damages or penalty is based on equitable principles, it cannot depend on the form of the transaction, but rather on its substance. It follows that a contract expressed to be in the alternative when examined in the light of the existing facts may prove to be (1) a contract contemplating a single definite performance with a penalty stated as an alternative, (2) a contract contemplating a single definite performance with a sum named as liquidated damages as an alternative, or (3) a contract by which either alternative may prove the more advantageous and is as open to the promisor as the other.

Id. (quoting 3 WILLISTON ON CONTRACTS (REV. ED.) 2194, § 781). This point was also emphasized in *Bentley*, upon which Clearwire places substantial reliance. *Bellevue School District v. Bentley*, 36 Wn. App. 152, 155, 684 P.2d 793 (1984) (holding that whether a clause should be characterized as an alternative performance provision "must be solved as a question of factual interpretation, and the form of words used by the parties is not controlling.") (citing *Chandler,* at 401, 267 P.2d 907 and 5 WILLISTON ON CONTRACTS, § 781 (REV. ED. 1961)). Thus, the fact that Clearwire did not style the ETF as a liquidated damages clause does not distinguish this case from *In re Cellphone Fee Termination Cases*; indeed, nor does the phrase "alternative performance" appear in the agreement.

Nor is Clearwire's argument that Sprint "imposed" its ETF whereas these plaintiffs "chose" to pay Clearwire's ETF legally relevant or factually correct. It is legally irrelevant because, from a consumer's perspective, Sprint's ETFs and Clearwire's ETFs are no different. In both cases, the ETFs are lump sum fees that are charged if the consumer tries to get out of his or her long-term subscription contract. In both cases, the consumer is faced with the same decision: keep making monthly payments, or get hit with an ETF. Clearwire's suggestion that its customers "chose" to pay the ETF, while Sprint's customer did *not* "choose" to pay Sprint's ETF, ignores reality.

At least in the context of modern-day consumer subscription agreements, Clearwire's proposed "choice v. imposition" distinction is meaningless. Vendors (including Clearwire) often require a customer to provide a credit card, debit card or bank account number, and both the payment of monthly service fees, and the impositions of ETFs, occur through electronic funds transfers. Regardless of how the particular contract of adhesion is worded, from the consumer's perspective the ETF is simply "taken" from them by the vendor. Customers of different vendors "experience" ETFs in the same way. Accordingly, a legal standard that focuses on this distinction puts form over substance.

Moreover, Clearwire's Agreement does *not* describe the ETFs as a "choice." Rather, it tells the customer that "if . . . you terminate the Service," or if "that Service is terminated by Clearwire for any violation by you of the Agreement . . . you will be liable for an early termination fee[.]" ER 61, ER 63. The Service Agreement does not present the ETF as one of two alternative ways to perform. To the contrary, the Service Agreement presents the ETF as a liability that the customer will incur if he or she terminates or violates the Agreement. Thus, the Clearwire Service Agreement is not different in any material way from the agreement that was at issue in *In re Cellphone Fee Termination Cases.*

In light of that, Clearwire's reliance on *Hutchison v. AT&T Internet Serv.*, No. CV 07-3674 SVW (JCx), 2009 WL 1726344 (C.D. Cal. May 5, 2009), and *Schneider v. Verizon Internet Servs., Inc.*, No. CV 08-07857 R CWx (C.D. Cal. Mar. 18, 2009), is misplaced. Both of those federal district court decisions were merely "predictions" of California state law, made by federal judges who did not have the benefit of *In re Cellphone Fee Termination Cases.* Although both *Hutchison* and *Schneider* were affirmed by the Ninth Circuit, those affirmances were in unpublished decisions, which were issued prior to *In re Cellphone Fee*

Termination Cases. Thus, neither *Hutchison* nor *Schneider* offer reliable readings of current California law.[4]

C. Contrary to Clearwire's Arguments, ETFs Should Not Be Considered A Form Of "Alternative Performance" If a Vendor Owes No Return Performance in Exchange for the ETFs.

The "real option"/"reasonable relationship" standard proposed by Clearwire fails to take into account the requirement that for payment of a stipulated sum of money to be a form of "alternative performance," that payment must be "given in exchange for the return performance by the other party." *Chandler*, 44 Wn.2d at 401, 267 P.2d at 910 (1954) (quoting 5 CORBIN ON CONTRACTS § 1079, AT 379). Clearwire argues that an ETF can be considered "alternative performance" even if it "results (as here) in termination of the parties' relationship, relieving both of further obligations to each other." Def. Br. at 32. Thus, Clearwire argues that this language in the Washington case law, drawn from leading treatises on

---

[4] Clearwire attempts to distinguish *Mau v. L.A. Fitness International, LLC*, 749 F.Supp.2d 845, 850 (N.D. Ill. 2010), and *Maddox v. ADT*, No. 10 C 3778, 2011 WL 43037 at *1 (N.D. Ill. Jan. 6, 2011). But both cases agree that ETFs are liquidated damages and not "alternative performance." Plaintiffs discussed *Mau* in detail in their Opening Brief, and will not repeat that discussion here. With respect to *Maddox*, Clearwire concedes that the ETF was considered an enforceable clause for "agreed upon damages"—and not an alternative performance provision. Def. Br. at 27. But according to Clearwire, the court's decision not to "analyz[e] the issue under the 'alternative performance' rubric" means that all ETFs are "economically rational" alternatives. *Id.* That quantum leap disregards that the court first assessed the reasonableness of the particular ETF, and concluded that it was enforceable because there was no "imbalance in the obligations and rights imposed by the bargain," and it did not "'exceed[] a reasonable estimate of the loss from breach,'" which cannot be determined on this record. *Maddox*, 2011 WL 43037 at *2 (quoting in part *Scavenger Sale Investors, L.P. v. Bryant*, 288 F.3d 309, 311 (7th Cir. 2002)). Thus, *Maddox* can hardly be said to support Clearwire's position here.

contract law, is meaningless, and that an ETF can be an "alternative performance" even if it is *not* "given in exchange for the return performance by the other party."

Clearwire discusses *Chandler* and *Bentley*, and argues that these cases show that "an alternative contract may contemplate terminating the agreement." Def. Br. at 33. But neither of those cases addressed the question presented here, *i.e.*, whether a termination fee should be treated as liquidated damages *for the purpose* of determining whether that fee constitutes an unlawful penalty.

Moreover, *Chandler* is not helpful to Clearwire's cause, and *Bentley* is distinguishable. Starting with *Chandler*, that case stands for the proposition that where a contract provides for two alternative forms of performance, one of which is invalid by operation of law (in that case because it was an oral agreement providing for the transfer of a real property interest and therefore violated the Statute of Frauds) and the other of which is not (in that case the oral agreement's providing for the payment of additional salary upon the occurrence of a contingency), recovery may be had for breach of that which is not. *Chandler*, 44 Wn.2d at 401 (citing 2 CORBIN ON CONTRACTS, 136, § 316). It also provides general guidance that is not at all helpful to Clearwire, as explained above.

Turning to *Bentley*, in that case the court concluded that the collective bargaining agreement at issue contained an alternative performance provision because it gave the teacher the option of repaying money she had collected during her one-year sabbatical or returning to work for the district for two years. But, unlike the situation presented here, the school district had already fully performed its end of the bargain (paying the teacher her salary during her one-year absence and then offering her a teaching position). In essence, the teacher there could not demand any additional performance from the district in exchange for her performance (*i.e.* returning to work or repaying the salary she had already received). Thus, the teacher's failure to return to work after her sabbatical required her to repay the salary she had collected during her one-year absence. 36 Wn. App. at 157-158, 684 P.2d 793.

At bottom, neither *Chandler* nor *Bentley* offers a clear answer as to how Clearwire's ETFs should be treated, which is precisely why the Ninth Circuit certified this case to this Court.

Clearwire also discusses a number of cases, primarily from California, which it claims "hold, in a variety of contexts, that the right to terminate a contract early in exchange for a lump-sum payment constitutes an alternative performance option—even though it results in termination of the relationship and frees both parties of the obligation to perform." Def. Br. at 34. But all of those cases are easily distinguished.

First, all of the California cases cited by Clearwire were decided before the 2011 decision in *In re Cell Phone Fee Termination Cases*, 193 Cal. App. 4th 298, 122 Cal. Rptr. 3d 726, which held that ETFs such as those at issue here are properly classified as liquidated damages, not as an alternative performance. In light of *In re Cell Phone Fee Termination Cases*, Clearwire's claim that current California law favors its position is difficult to comprehend.

Second, some of these cases actually support Plaintiffs' position. For example, in *Kauffman Stewart, Inc. v. Weinbrenner Shoe Co.*, 589 N.W.2d 499, 502 (Minn. Ct. App. 1999), the plaintiff-lessee agreed to continue to pay for an advertising agency's services for 60 days post termination. During this time, the plaintiff had access to the advertising agency's services and the agency continued to commit to serve the plaintiff during the termination period. *Id.* at 503. The same is true of *In re Cmty. Med. Ctr.*, 623 F.2d 864 (3rd Cir. 1980), and *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 27 Cal. Rptr. 3d 797 (2005). In *In re Cmty. Med. Ctr.*, the plaintiffs received a bundle of services and were to pay a monthly minimum payment of $1500, regardless of actual usage. 623 F.2d at 865-66. When plaintiffs challenged this fee during a month where they had not used $1500 worth of services, the medical company was willing to continue its performance of the agreement. *See id.* at 867. In *Morris*, the fee in question was considered an alternative performance because it was a "deferred charge attendant to initiating an account." 128 Cal. App. 4th at 1315. By definition, the bank had already performed; the initiation of the account was a service that the plaintiff had yet to pay for.

Third, the contractual language in all of the cases cited by Clearwire is markedly different than the language used in Clearwire's Service Agreement. In short, all of these cases, with the possible exception of *Morris*, involved negotiated agreements between sophisticated parties, not consumer contracts of adhesion, and are thus of limited precedential value, particularly in light of *In re Cellphone Fee Termination Cases*.

D. Contrary to Clearwire's Argument, the Manner in Which Clearwire Assesses ETFs Under Its Service Agreement Is Not "Hypothetical," but Rather Is Clear from the Complaint and the Terms of the Agreement Itself, and Is Inconsistent with the Well-Established "Cheaper Election" Rule.

Clearwire wants to have its cake and eat it too. It urges this Court to declare that the ETFs are merely a form of "alternative performance," and thus insulate the ETFs from the standards that normally apply to liquidated damages provisions. But it wants to be able to collect the ETFs even under circumstances that *would not be permissible* if the ETFs were truly a form of "alternative performance."

As demonstrated in the Opening Brief, the terms of Clearwire's Service Agreement permit Clearwire to collect the ETF regardless of whether it is more or less than the sum of the remaining monthly payments, something that would not be permissible if the ETFs were a form of "alternative performance." *See* Opening Br. at 34-37. In true "alternative" contracts, if the promisor has not elected between the two alternatives and then breaches the contract, the promisee is entitled to recover only those damages flowing from the alternative resulting in the smaller recovery. Thus, if one assumes (as Clearwire does) that its damages are equal to the sum of the remaining monthly payments, and if (as Clearwire argues) the ETFs are merely an "alternative performance," then Clearwire could never recover the amount of the ETFs if that amount were greater than the sum of the remaining monthly payments.

Clearwire attempts to dodge this issue by arguing that what Plaintiffs are proposing is merely "hypothetical." Def. Br. at 39. The Complaint, however, explicitly alleges that certain of the Plaintiffs continued to make monthly payments to Clearwire precisely because Clearwire threatened to impose an ETF if they terminated, *even where the ETF would have been greater than the sum of the remaining monthly payments*. See ER 31-46. Thus, the Complaint does allege that Clearwire imposes ETFs (or at least threatens to) under those circumstances.

Moreover, the terms of the Service Agreement make clear that Clearwire would indeed impose the ETF without regard to whether it was greater than the sum of the remaining monthly payments. Thus, Plaintiffs' argument is not based on "hypothetical" facts; it is based on the allegations of the Complaint, and the language of the Service Agreement.

Clearwire also argues that more recent authority rejects the rule that, where a promisor that has not made an election breaches an alternative performance contract, the promisee's damages are measured by the alternative "resulting in the smallest recovery." Restatement (First) of Contracts § 344. This rule flows from the principle that, in an alternative performance contract, a promisee "cannot compel the performance of one alternative when the promisor properly elects the other." *Bentley*, 38 Wn. App. at 155, 684 P.2d at 796 (citing *Chandler v. Doran Co.*, 66 Wash.2d 396, 267 P.2d 907 (1954)). But Plaintiffs' Opening Brief cited a long history of authority for this rule, including the fairly recent case of *Koby v. United States*, 53 Fed. Cl. 493, 501 (2002).

The two cases cited by Clearwire, *Gronemeyer v. Hunter Mfg. Corp.*, 106 A.2d 519 (Del. Ch. 1954), and *Schwan-Stabilo Cosmetics GMBH & Co. v. PacificLink Int'l Corp.*, 401 F.3d 28, 34 (2d Cir. 2005), are not to the contrary. In both cases, the breaching party was forced to pay the alternative he or she had *actually elected*, even though that alternative was more expensive than the other. *See Hunter*, 106 A.2d at 523-24; *PacificLink*, 401 F.3d at 34. That is an accurate application of the law, but an entirely different situation.

A Clearwire customer does not make an "election" as to which performance the customer will make in exchange for Clearwire's service. Rather, there is only one way for the customer to obtain Clearwire's performance, namely, to continue to make monthly payments. If the customer stops performing, then the customer becomes "liable" for the ETF, and Clearwire can collect the ETF without regard to whether it is more or less than what the customer would have paid in future monthly payments. That is not the way a true alternative performance contract would work, and thus demonstrates that the ETFs are, indeed, simply liquidated damages by another name.

E. The Broad Standards Proposed by Clearwire Implicate Numerous Factual Issues, and Thus Would Not Support Dismissal of the Complaint.

1. Clearwire's Proposed "Real Option"/"Reasonable Relationship" Standard Could Not Be Applied Without Further Factual Development.

Even if the Court were to adopt Clearwire's proposed "real option"/"reasonable relationship" standard, the Court would be unable to apply that standard here without further factual development. According to Clearwire, the "real option"/"reasonable relationship" standard is met—

and the ETFs are not liquidated damages—if the amount of the ETFs is less than the amount that would be owed by a consumer in the absence of the ETFs. *See* Def. Br. at 18-21. But Clearwire's assumption that, in the absence of the ETFs, it would be entitled to recover the sum of the remaining monthly payments is wrong. To begin with, as alleged in the Complaint, Plaintiffs sought to cancel their subscriptions due to poor, and in some cases nonexistent, service. If Clearwire attempted to sue those customers for breach of contract and seek as damages the value of the remaining payments, that claim would be met with the defense that Clearwire's own material nonperformance/breach relieved or reduced the customer's obligation to pay Clearwire. *See* RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981); *see also City of Woodinville v. Northshore United Church of Christ*, 166 Wn. 2d 633, 211 P.3d 406 (2009) (if one party materially breaches a contract, the other party may treat the breach as a condition excusing further performance).

But even putting aside Clearwire's performance issues, Clearwire is incorrect in its contention that customers would automatically be liable to Clearwire for the sum of the remaining monthly payments. *See* Def. Br. at 18-21. Instead, a customer's liability would be limited to Clearwire's damages, and those damages would almost certainly be *less* than the sum of the remaining monthly payments.

Ignoring the obligation to mitigate, where one party breaches a contract requiring payment of money, the non-breaching party's damages are *not* simply the money owed by the breaching party under the contract. Rather, the non-breaching party's damages are measured by its "expectation interest," *i.e.*, "a sum of money that will, to the extent possible, put the injured party in as good a position as that party would have been in had the contract been performed." *See* 25 Keller W. Allen, Darlene Barrier Caruso, David K. DeWolf, WASHINGTON PRACTICE SERIES, § 14:4 (2011). One consequence of that rule is that "[i]f the [breaching party], by his breach, relieves the [non-breaching party] of duties under the contract which would have required him to spend money, an amount equal to such expenditures must be deducted from his recovery." *Platts v. Arney,* 50 Wn.2d 42, 46, 309 P.2d 372, 375 (1957); *see also Lincor Contractors, Ltd. v. Hyskell*, 39 Wn. App. 317, 321, 692 P.2d 903, 906 (1984).

The RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981)— cited with approval by this Court in *Eastlake Const. Co., Inc. v. Hess*, 102 Wn. 2d 30, 46, 686 P.2d 465, 473 (1984)— explains that damages must take into account not only what is owed by the breaching party, but also, at a minimum, "any cost or other loss that [the non-breaching party] has avoided by not having to perform." *See also* 24 Richard A. Lord,

WILLISTON ON CONTRACTS, § 64.1 (4^{TH} ED. 2011) (calculation of damages is the "loss in value minus the value of the performance actually rendered less expenses saved or losses avoided").

As Clearwire recognizes, *see* Def. Br. at 28, this very issue was addressed in *In re Cellphone Fee Termination Cases*. There, in a class action challenging Sprint's ETFs, Sprint filed a counter-claim, seeking the damages it alleged it would have recovered if the ETF provision could not be enforced. *In re Cellphone Fee Termination Cases*, 193 Cal. App. 4th at 307, 122 Cal. Rptr. 3d at 734. The jury found in favor of the class on the ETF issue, but awarded damages to Sprint in an amount equal to the unpaid monthly fees. 193 Cal. App. 4th at 307, 122 Cal. Rptr. 3d at 735. The trial court, however, granted a new trial on Sprint's damages because the jury's award failed to take into account Sprint's "avoidable costs," and thus awarded Sprint more than its "actual total economic damages." 193 Cal. App. 4th at 309, 122 Cal. Rptr. 3d at 736. The Court of Appeal agreed, and upheld the grant of a new trial on Sprint's damages. 193 Cal. App. 4th at 330, 122 Cal. Rptr. 3d at 753.

Accordingly, Clearwire is wrong when it argues that its "real option"/"reasonable relationship" standard is met simply because the ETFs are, at some point during the term of the Service Agreement, less than the sum of the remaining monthly payments. Instead, if the Court were to adopt that standard, a remand would be required to determine the extent of the Plaintiffs' liability to Clearwire (if any) in the absence of the ETFs. That liability would be measured by Clearwire's "expectation interest," which would require fact-finding with respect to Clearwire's "avoidable costs," and whatever other factors might relate to its true economic damages. Thus, whether the ETFs were less than Plaintiffs' alternative liability to Clearwire at any point in time—*i.e.*, whether the ETFs were a "less expensive option," as claimed by Clearwire—cannot be determined on the current record.

2. Clearwire's Twin Contentions that Plaintiffs "Chose" to Pay the ETFs, and that Clearwire Did Not "Impose" the ETFs, Are Factual Characterizations that, at Least with Respect to Some of the Plaintiffs, Are Wrong.

As discussed above, Clearwire's proposed distinction between an ETF that is "chosen" by a consumer, and an ETF that is "imposed" by a vendor, is not only illusory, it is of no help to Clearwire. Contrary to Clearwire's contention, Plaintiffs' Complaint does *not* allege that the Plaintiffs "chose" to pay the ETF. Rather, the Complaint repeatedly alleges that Clearwire "imposes" the ETFs, *see* ER 16-31 (Complaint ¶¶ 1.5-1.7, 5.18, 5.19, 5.20), exactly the allegation that Clearwire suggests would be sufficient to require reversal.

With respect to two of the Plaintiffs, Minnick and Jelinski, the Complaint alleges that they affirmatively *refused* to pay the ETF (in other words, chose *not* to pay the ETF), and Clearwire responded by turning their accounts over to a collection agency for collection of the ETFs. *See* ER 35, 39. Even under Clearwire's broad definition of the word "choose," it is beyond doubt that *these* Plaintiffs did not "choose" an ETF. Rather, they are being *actively pursued by Clearwire* for the ETF.

With respect to those Plaintiffs who stayed in their contracts, and thus did not have an ETF imposed on them, the Complaint again does *not* describe this as a "choice," but rather describes it as a situation into which the plaintiffs were "forced" by virtue of the ETFs, even though they were receiving either intolerably slow service, or no service at all. *See*, *e.g.*, ER 36 (Complaint, ¶ 5.40).

In addition, as discussed above, the language of the Service Agreement does *not* describe the ETFs as a choice. Rather, the Service Agreement presents the ETF as a liability that the customer will incur if he or she terminates or violates the Agreement. Thus, the Service Agreement itself is evidence contrary to Clearwire's characterization.

This discussion shows that "choice" is not the appropriate dividing line between liquidated damages and alternative performance. If "choice" is the test, then all liquidated damages clauses could be characterized as "alternative performance." And adding the word "reasonable" to the word "choice" adds little, because nearly every decision to enter into a contract or to subsequently breach that contract could be characterized as "reasonable" from the perspective of the contracting parties. Neither "choice" nor "reasonable choice" provides a meaningful dividing line between liquidated damages and alternative performance.[5]

III. CONCLUSION

For the reasons stated herein, and in the Opening Brief of Appellant, the Court should recommend that the Ninth Circuit reverse the district court's order granting Clearwire's motion to dismiss, and remand for further proceedings.

Dated: June 23, 2011

Respectfully Submitted,

FELIX G. LUNA
PETERSON YOUNG PUTRA, P.S.
1501 Fourth Avenue
Suite 2800
Seattle, WA 98101-160
(206-624-6800
Attorneys For Appellants

[5] Clearwire urges the Court to "decline" Plaintiffs' "invitation" to hold that the ETFs are unenforceable. Def. Br. at 45. Plaintiffs have made no such invitation. As made clear in the Opening Brief, the enforceability of the ETFs under standards application to liquidated damages is a factual issue that cannot be resolved at this stage. But because it is a factual issue, and because the Complaint alleges that the ETFs are unenforceable penalties, it must be assumed—for purposes of this appeal—that they are.

JONATHAN K. TYCKO
MELANIE J.
WILLIAMSON
TYCKO & ZAVAREEI LLP
2000 L Street, N.W., Suite
808
Washington, D.C. 20036
(202) 973-0900
Attorneys For Appellants

CERTIFICATE OF SERVICE

I certify that on the 23 day of June, 2011, a copy of this document was sent as stated below.

Washington State Supreme Court Temple of Justice PO Box 40929 Olympia, WA 98504-0929	☒ via efiling/email ☐ via messenger ☒ via US Mail ☐ via fax
Stephen M. Rummage Davis Wright Tremaine 1201 3rd Avenue, #2200 Seattle, WA 98101	☒ via efiling/email ☐ via messenger ☒ via US Mail ☐ via fax

SIGNED in Seattle, Washington this 23 day of June, 2011.

Dana Vizzare

Dana Vizzare

EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHAD MINNICK, et. al., Plaintiffs, v. CLEARWIRE US, LLC and DOES 1 through 10, Defendants.	CASE NO. C09-912 MJP ORDER DENYING INDICATIVE RULING

This comes before the Court on Plaintiffs' motion for an indicative ruling. (Dkt. No. 31.) Having reviewed the motion, the response (Dkt. No. 34), the reply (Dkt. No. 38), and all related filings, the Court DENIES Plaintiffs' motion.

Background

Defendant Clearwire US, LLC ("Clearwire") provides wireless internet and phone service. On May 26, 2009, twelve named Plaintiffs brought this action on behalf of Clearwire customers who have contracts that include an early termination fee ("ETF") or who have paid or been charged an ETF since April 21, 2005. (Dkt. No. 1, Ex. B.) Plaintiffs argue the ETF is an unlawful business practice and sued for violations of the Washington Consumer Protection Act ("CPA"). Plaintiffs also allege Clearwire breached the service agreements by providing lower quality internet and phone service than was promised. (Id.)

On February 5, 2010, this Court granted Clearwire's motion to dismiss Plaintiffs' first amended complaint. In part, the Court based its dismissal on the absence of any specifically alleged deceptive act or practice on the part of Clearwire. (Dkt. No. 23 at 8-9.) The Court gave Plaintiffs thirty days to file a second amended complaint, and when Plaintiffs did not, the Court entered judgment in favor of Clearwire on March 15, 2010. (Dkt. No. 27.) Plaintiffs' appeal remains pending before the Ninth Circuit.

On November 30, 2010, a former Clearwire employee, Donald Hammond, contacted Plaintiffs counsel. (Pl. Mot. Br. at 3.) Mr. Hammond informed Plaintiffs of "Project Star Trek," which was a "scheme to artificially boost the number of the company's gross subscribers by enrolling new customers that lived outside of Clearwire's service area." (Id. at 2-3) On March 3, 2011, someone mailed Plaintiffs' counsel what appears to be a copy of an internal Clearwire e-mail discussing the project. (Id. at 3; Dkt. No. 32, Ex. A.)

Plaintiffs now request leave to amend the complaint pursuant to Rule 62.1 and Rule 60 of the Federal Rules of Civil Procedure to include allegations that Project Star Trek was a deceptive business practice. Plaintiffs acknowledge that, because of the appeal, the Court is without jurisdiction to grant leave. However, Plaintiffs request the Court issue a ruling indicating it would grant Plaintiffs' motion if the Court of Appeals were to remand the case for that reason.

Analysis

Plaintiffs seek leave to amend under Rule 60 of the Federal Rules of Civil Procedure. While Plaintiffs recognize the Court lacks jurisdiction while the appeal is pending, Plaintiffs seek an indicative ruling under Rule 62.1 of the Federal Rules of Civil Procedure. Effective on December 1, 2009, Rule 62.1 states, "[i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state ... that it would grant the motion if the court of appeals remands for that purpose[.]" Fed. R. Civ. P. 62.1(a).

In requesting leave to amend, Plaintiffs rely on Rule 60(b)(6) and/or Rule 60(d)(1) of the Federal Rules of Civil Procedure. The Court finds Plaintiffs reliance misplaced. First, while Rule 60(b)(6) allows relief for "any other reason that justifies relief," "the long-standing rule in [the Ninth C]ircuit is that, 'clause (6) must be for some reason other than the five reasons preceding it under the rule." Lyon v. Agusta S.P.A., 252 F.3d 1078, 1088-89 (9th Cir. 2001)(quoting Molloy v. Wilson, 878 F.2d 313, 316 (9th Cir. 1989)). Plaintiffs seek leave to amend based on information recently obtained about Project Star Trek. This reason is covered by Rule 60(b)(2), which allows leave to amend based on newly discovered evidence. Rule 60(b)(6), therefore, does not apply. Since Plaintiffs concede Rule 60(b)(2) motions must be made within a year after judgment, Rule 60(b)(2) likewise provide no grounds for granting leave to amend. See Fed. R. Civ. P. 60(b)(2).

Second, leave to amend under Rule 60(d)(1) is unwarranted. Under Rule 60(d)(1), a court may "entertain an independent action to relieve a party from a judgment, order, or proceeding[.]" Fed. R. Civ. P. 60(d)(1). "[A]n independent action to set aside a prior judgment is based on equity. Appling v. State Farm Mut. Auto. Ins. Co., 340 F.3d 769, 780 (9th Cir. 2003). "Independent actions must ... be reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata." United States v. Beggerly, 524 U.S. 38, 46 (1998) (quoting Hazel-

Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944)). The Beggerly Court concluded that "an independent action should be available only to prevent a grave miscarriage of justice." Id. at 47.

Here, Plaintiffs assert they would be prejudiced if the Court denies relief because they would be "forced to litigate two separate-but overlapping-cases simultaneously." (Pl. Mot. Br. at 11.) Plaintiffs describe this result as "inefficient and expensive" and argue that it "could result in conflicting decisions or results." (Id.) Plaintiffs assert that this "is a unique situation that justifies the extraordinary relief contemplated by Rule 60(d)(1)." (Pl. Reply Br. at 5.) Plaintiffs offer no authority to support their argument that "extraordinary relief" is warranted. Although efficiency is a valid concern, the Court does not find that it rises to the level of a "gross injustice" or "grave miscarriage of justice" as required by Beggerly. 524 U.S. at 46-47. As a result, the Court DENIES Plaintiffs' motion under Rule 60(d).

Conclusion

The Court DENIES Plaintiffs' motion for leave to amend based on newly discovered evidence because one year has passed since judgment was entered and Plaintiffs fail to demonstrate a gross injustice.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 4th day of June, 2011.

Marsha J. Pechman
United States District Judge